

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CORY WILLINGHAM
Claimant

VS.

CITY OF TOPEKA
Self-Insured Respondent

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Docket No. 1,048,327

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 12, 2011, Order Upon Remand entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on December 13, 2011. George H. Pearson, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for the self-insured respondent.

In the Order Upon Remand, the ALJ overruled respondent's objection to the inclusion of Dr. Bieri's task loss opinion in the record.

ISSUES

Respondent first asks permission of the Board to file its application for review out of time. Respondent argues it did not receive a copy of the Board's August 10, 2011, Order until October 21, 2011. Respondent did receive the ALJ's Order Upon Remand dated August 12, 2011. However, respondent argues nothing in the Order Upon Remand notified it that the Board would not simply consider the ALJ's Order Upon Remand as part of its determination of respondent's previous application for review of the Award. Accordingly, under the doctrine of "unique circumstances" and because it acted in good faith, respondent asks the Board to consider its Application for Review in this matter. In the alternative, respondent asserts that no final award had been issued since the Board's August 10, 2011, Order did not dismiss the appeal and the ALJ's Order Upon Remand did not affirm or incorporate the initial award.

Respondent also asks that the Board reverse the ALJ's Order Upon Remand, arguing that the ALJ's basis for overruling its objection to the inclusion of Dr. Bieri's task loss opinion in the record is unfounded and the ALJ exceeded his authority.

Claimant objects to the respondent's application for review of the Order Upon Remand, arguing that it was filed out of time and further argues that respondent is out of time to seek review of the ALJ's May 3, 2011, Award.

The issues for the Board's review are:

- (1) Is the ALJ's Order Upon Remand a final order?
- (2) If so, should respondent be permitted to file its Application for Review out of time?
- (3) If so, did the ALJ exceed his authority in overruling respondent's objection to the inclusion of Dr. Bieri's task list in the record?
- (4) Does the Board have jurisdiction to review the Award entered May 3, 2011?

FINDINGS OF FACT

Claimant was employed by respondent as a street maintenance worker. On November 9, 2009, he was injured when a paving machine rolled over his right foot. He filed an Application for Hearing on November 17, 2009, claiming injuries to his right leg and foot. On May 3, 2011, the ALJ entered an Award finding that claimant had a 7 percent functional impairment to the whole body and a work disability of 71.34 percent. On May 13, 2011, respondent filed an application for review of the ALJ's Award, arguing issues concerning claimant's average weekly wage and the nature and extent of disability. One of respondent's issues on appeal to the Board was whether the medical report and deposition testimony of Dr. Peter Bieri should be a part of the record.

The Board heard oral argument on respondent's appeal on August 2, 2011. On August 10, 2011, the Board entered its Order finding the ALJ did not rule on respondent's objections to Dr. Bieri's testimony concerning claimant's task loss. Accordingly, the Board remanded the case to the ALJ for "a determination on respondent's objection to the

admission of Dr. Bieri's opinions concerning claimant's loss of task performing ability."¹ Further, the Board stated that it "does not retain jurisdiction of this appeal."²

On August 12, 2011, the ALJ entered an Order Upon Remand in which he ruled: "Objection to Dr. Bieri's consideration of task list is overruled. Non-contact rule applies to the period in which the doctor has seen the claimant and before the IME report is written."³ The ALJ did not include language from his original Award filed May 3, 2011, nor did he incorporate that earlier Award by reference. The ALJ did not make any finding or award of compensation for claimant or deny any benefits to claimant. The Order Upon Remand only made a ruling on an evidentiary question.

Respondent's attorney acknowledged he received a copy of the ALJ's Order Upon Remand by electronic mail on August 12, 2011. But he contends he did not receive a copy of the Board's Order of August 10, 2011, until after receiving the Order Upon Remand and later contacting claimant's attorney questioning his lack of receipt of an order from the Board. Respondent's attorney then contacted the Division on or about October 21, 2011, and received a copy of the Board's Order on that date.

On October 26, 2011, respondent filed an Application for Review and for Permission to File Out of Time. In its brief to the Board filed November 8, 2011, respondent asserted it did not receive the Board's August 10, 2011, Order until October 21, 2011. Respondent also contended that no final award had been issued in this case. Claimant filed his brief to the Board on November 18, 2011, wherein he argued that respondent should not be allowed to file an application for review out of time. On December 13, 2011, oral argument was held before the Board on respondent's Application for Review and for Permission to File Out of Time.

PRINCIPLES OF LAW

K.S.A. 44-525(a) states:

Every finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. The award of the

¹ *Willingham v. City of Topeka*, Docket No. 1,048,327, 2011 WL 4011672 (Kan. WCAB Aug. 10, 2011).

² *Id.*

³ ALJ Order Upon Remand (Aug. 12, 2011).

administrative law judge shall be effective the day following the date noted in the award.

K.S.A. 44-551(i)(1) states in part: "All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days."

K.S.A. 2010 Supp. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS AND CONCLUSION

In its August 10, 2011, Order, the Board expressly did not retain jurisdiction of respondent's appeal from the May 3, 2011, Award entered by Judge Avery. Respondent did not receive a copy of the Board's Order before Judge Avery acted upon the remand and entered his August 12, 2011, Order Upon Remand. Respondent admits it timely received the ALJ's Order Upon Remand. Nevertheless, respondent did not timely inquire as to why the ALJ issued an "Order Upon Remand" if the Board had not remanded the matter to the ALJ. The essential question is whether the Board has jurisdiction to review the ALJ's May 3, 2011, Award.

The Board concludes that it does not have jurisdiction of the May 3, 2011, Award at this time. However, the Board agrees with respondent that the August 12, 2011, Order Upon Remand does not comply with K.S.A. 44-525(a) and is neither a final order nor an award of compensation. It could be inferred that in issuing his August 12, 2011, Order Upon Remand, the ALJ was affirming and adopting his original Award of May 3, 2011, but the order does not so state. The Board will not read into the Order Upon Remand something that is not there. Therefore, the Board will again remand this matter to the ALJ with instructions to either enter an award granting or denying compensation or to specifically adopt his original Award of May 3, 2011.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order Upon Remand entered August 12, 2011, by Administrative Law Judge Brad E. Avery, is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Matthew S. Crowley, Attorney for the Self-Insured Respondent
Brad E. Avery, Administrative Law Judge